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No. 44

Supreme Court
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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY CO., ET AL., APPELLANTS,

VS.

THE UNITED STATES OF AMERICA, ET AL., APPELLEES.

## JURISDICTIONAL STATEMENT FOR APPELLANTS UNDER RULE 12.

F. H. Moore,
W. E. Davis,
E. T. Miller,
M. G. Roberts,
J. R. Bell,
G. H. Muckley,
H. H. Larimore,
C. S. Burg,
J. R. Turney,
Robert Thompson,
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*Of Counsel.*

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# SUPREME COURT OF THE UNITED STATES

THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY, ET AL., APPELLANTS,

VS.

THE UNITED STATES OF AMERICA, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.

## JURISDICTIONAL STATEMENT FOR APPELLANTS UNDER RULE 12.

The appellants in support of the jurisdiction of this court to review the above entitled cause on appeal respectfully represent:

**A. The Statutory Provisions Sustaining Jurisdiction.**

Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, 43 Stat. 936, 938 (U. S. C. Tit. 28, Sec. 345), provides as follows:

> A direct review by the Supreme Court of an interlocutory or final judgment or decree of a District

Court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

* * *

(4) So much of "An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes," approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

The Urgent Deficiencies Act of October 22, 1913, Ch. 32, 38 Stat. 208, 219-220 (U. S. C. Tit. 28, Sec. 41 (28), 47 and 47-a) confers jurisdiction upon the District Court of suits brought to enjoin, set aside, annul, or suspend "in whole or in part any order of the Interstate Commerce Commission," and, with respect to review by the Supreme Court of decrees entered in such suits, provides as follows:

> A final judgment or decree of the District Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases.

**B. Date of Decree, and Date of Application for Appeal.**

The final decree sought to be reviewed was entered on November 27, 1929 (R. 60).*

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*References are made to pages of the certified unprinted record prepared by the clerk of the District Court and on file with the clerk of this court, as the record has not yet been printed.

The application for appeal was presented on November 27, 1929 (R. 60, 61), together with an assignment of errors (R. 60, 64). An order granting the appeal was entered November 30, 1929 (R. 80), appeal bond approved and filed on the same date (R. 84-88), and citation issued, and due and timely service acknowledged (R. "A").

The time for completing the transcript and docketing the case in this court was extended by the lower court to February 1, 1930, by order made on December 26, 1929 (R. 104), and to February 10, 1930, by order made on January 22, 1930 (R. 1750), and the cause was docketed in this court on February 8, 1930.

**C. Nature of the Case and Rulings Below.**

The appellants, who are carriers operating in the Southwestern territory, were plaintiffs below, and will be referred herein as "the plaintiffs." They appealed from the decree of the lower court, consisting of three judges under the Urgent Deficiencies Act, which dismissed their petition brought to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission made on June 10, 1929, in the proceeding before it designated as Docket No. 15234, prescribing a new basis of divisions of revenue from joint rates on certain specified traffic. The order was afterwards modified and its effective date extended. The original order and its subsequent modifications are herein for convenience referred to as "the order."

The Commission, in the said proceeding, which was instituted by it, upon its own initiative, and which re-

sulted in the order in question, reported in 148 I. C. C. 457 and 156 I. C. C. 94, purported to act under authority contained in paragraph (6) of Section 15 of the Interstate Commerce Act, which reads as follows:

> Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily,

without regard to the mileage haul, entitle one carrier to a greater or less porportion than another carrier of the joint rate, fare or charge.

After a hearing, the Commission found that the existing divisions of the revenue from joint rates applying between certain points on certain carriers in Southwestern territory and certain points on certain carriers in Western Trunk Line territory, and between certain points on certain carriers in Southwestern territory, passing over certain Western Trunk Line carriers, to and from certain Eastern territory, were unjust and inequitable; and it prescribed a new basis of divisions of such joint rates between said points, which it declared to be just, reasonable and equitable. Southwestern territory and Western Trunk Line territory are defined by the Commission (148 I. C. C. 458). The Commission called the carriers operating in Western Trunk Line territory, who were parties to the proceeding, the complainants, and the carriers operating in Southwestern territory, who were parties to the proceeding, defendants. All parties are thus listed (148 I. C. C. 458, 459).

The order provided that on said traffic moving via the gateways of Kansas City and St. Louis, Mo., and East St. Louis, Cairo, Gale and Thebes, Illinois, between points on the lines of defendants and points on the lines of the complainants, new divisions south and north of said gateways should be determined by dividing said joint rates in proportion to assumed rates for the two hauls, the assumed rate for the distance covered by the haul south of the gateway to be the first-class rate for that distance under the southwestern scale (which scale

was established, in Southwestern territory, by the Commission after the hearings in this proceeding were finished), and the assumed rate for the distance covered by the haul north of the gateway to be 80 per cent, when the gateway is Kansas City, and 75 per cent when the gateway is St. Louis, East St. Louis, Cairo, Gale, or Thebes, of the first-class rate for that distance under the same scale; that on said traffic in the remainder of the Western Trunk Line territory, eliminating the States of Illinois and Wisconsin, the new divisions should be determined by dividing the joint rates in proportion to assumed rates for the two hauls, the assumed rate for the distance covered by the haul south of the gateway to be the first-class rate for that distance under the said southwestern scale, and the assumed rate for the distance covered by the haul north of the gateway to be 87 per cent of the first-class rate for that distance under the same scale; that on said traffic between points on the lines of the defendants, and points in the teritory east of the Illinois-Indiana state line, and on and north of the Ohio River and the line formed by the Chesapeake & Ohio, Norfolk & Western, and Virginian between Cincinnati, Ohio, and Norfolk, Va., the divisions of the shares of said joint rates accruing to the defendants should be determined by dividing such shares in proportion to assumed rates for the two hauls, the assumed rate for the distance covered by the haul south of the gateway to be the first-class rate for that distance under the said southwestern scale, and the assumed rate for the distance covered by the haul of Western Trunk Line defendants north of the gateway to be 80 per cent, when the gateway is Kansas

City, and 75 per cent, when the gateway is St. Louis, East St. Louis, Cairo, Gale or Thebes, of the first-class rate for that distance under the same scale, minus 15 cents; and that where differentials are used in the construction of joint rates, such differentials should be deducted before prorating, and added to the amounts determined by the prorating process and accruing to defendants in the regions where the differentials apply.

The effect of the new divisions is to decrease the revenues of the lines of railroad in the Southwestern territory which are parties to the proceeding, and to increase correspondingly the revenues of such Western Trunk Line carriers as are parties. If the order is enforced, it will take $3,000,000 or more of revenue per annum from such Southwestern railroads, and transfer that amount of revenue to Western Trunk Line carriers.

Plaintiffs contended in the lower court, and will contend here, that the Commission's order prescribing a new basis of divisions is erroneous, arbitrary, unreasonable, unlawful, unsupported by the findings of fact, unsupported by any evidence in certain material matters, and unsupported by substantial evidence, in other material matters, repugnant to the provisions of the Interstate Commerce Act, and particularly to subdivision 6 of section 15 thereof, and constitutes a denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States, for reasons which may be summarized generally as follows:

1. The Commission could not lawfully reduce the divisions of the carriers in the Southwestern territory

without taking into consideration the situation, financially and otherwise, of each individual carrier, a party to the joint rates; and this it failed to do. It dealt with the Southwestern carriers collectively as a group, and with the Western Trunk Line carriers collectively as a group. There was no finding or evidence typical of all the carriers in either group; on the contrary, the evidence affirmatively disclosed that conditions of the carriers in each group were so dissimilar that no common divisions order could be made which would result in substantial justice. The arbitrary character of the order is made manifest by the fact that its effect is to take revenues from certain carriers in the Southwestern group, with small earnings, and in some cases operating at a deficit, and to hand them over to lines, such as the Burlington and Illinois Central, which are among the strongest roads, financially, in the country.

2. The order of the Commission was based on no rational and lawful plan:

(a) Because, although the said proceeding purported to be for the purpose of fixing divisions of the joint rates applying between two territories, it included only a part of the joint rates between those territories, and made only a part of the railroads, in said territories, parties respondent in said proceeding; and

(b) Because, although the findings of the Commission were with relation to the financial needs of the carriers, the order of the Commission grouped the carriers and prescribed divisions between such groups, without any relation to the financial abilities and necessities of the individual carriers.

3. The Commission found that the Southwestern railroads, as a group, require a greater average revenue of 17 to 20 per cent per ton per mile than the Western Trunk Line railroads as a group, in order to pay operating expenses, taxes, other like charges and a fair return on investment, and then, without any findings or evidence supporting such action, prescribed and ordered a basis of divisions which would yield to the Southwestern railroads only 9 per cent greater revenue per ton mile, on the average, than to the Western Trunk Lines.

4. The Commission's decision was based upon such incomplete, general, and unreliable evidence and conjectures (such as the inclusion of statistics of operating revenues and expenses of railroads which were not made parties to the said proceeding, and of statistics of operating revenues and expenses from all traffic and of the entire lines of railroad of said respondents, instead of being confined to the traffic transported under the joint rates involved in said proceeding, and to the portions of the lines of respondents which are located in Western Trunk Line territory and Southwestern territory, respectively) as prevented the making of reasonably accurate findings as the basis for an order.

5. The Commission's reports in the said proceeding show that none of said plaintiffs is earning a fair return on its investment, and the said order of the Commission, as to each of said plaintiffs is therefore confiscatory.

6. The Commission, as to material matters and issues, made findings and entered its order upon assump-

tions of fact not supported by the evidence before it, and considered matters which were not introduced in evidence.

7. The Commission prescribed divisions under a system or formula which was not submitted to nor within the contemplation of the parties to the proceeding, and was not based upon or supported by any evidence in said proceeding, and arbitrarily refused to grant to plaintiffs (respondent Southwestern lines, before the Commission) a rehearing in order that they might have an opportunity to show that said formula or method was based upon assumptions contrary to fact.

8. The findings and reports of the Commission show that its said order is contrary to the public interest.

The reasons are more fully stated in plaintiffs' amended petition (R. 18) and in the assignment of errors (R. 60, 64).

The lower court denied each and all of the contentions made by the plaintiffs and entered a decree dismissing the petition, and this appeal is brought to review its action in that behalf.

**D. Cases Believed to Sustain the Jurisdiction of this Appeal.**

*Akron, C. & Y. Ry. Co.* v. *United States,* 261 U. S. 184, 189.

*United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274, 280.

*Brimstone Railroad & Canal Co.* v. *United States,* 276 U. S. 104.

all of which cases involved similar appeals from orders, of the Commission fixing divisions of joint rates; also

*St. Louis & O'Fallon Railway Co.* v. *United States,* 279 U. S. 461, 482.

*Baltimore & Ohio R. R. Co.* v. *United States,* 279 U. S. 781, 784.

*Virginian Railway Co.* v. *United States,* 272 U. S. 658, 663.

*Chicago Junction Case,* 264 U. S. 258.

*Louisville & Nashville R. R. Co.* v. *United States,* 238 U. S. 1.

*United States* v. *The Baltimore & Ohio R. R. Co.,* 225 U. S. 306.

We respectfully submit that this court has jurisdiction of this appeal by virtue of Section 238 of the Judicial Code as amended by the Act of February 13, 1925.

Kansas City, Missouri, March 3, 1930.

Respectfully submitted,

F. H. Moore,
W. E. Davis,
E. T. Miller,
M. G. Roberts,
J. R. Bell,
G. H. Muckley,
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Supreme Court, U. S.
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No. 45

# In the Supreme Court of the United States

OCTOBER TERM, 1929

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, CROSS-APPELLANTS

*v.*

THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY, ET AL.

*CROSS-APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI*

## STATEMENT OF JURISDICTION

# In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 643

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, cross-appellants

*v.*

THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY, et al.

*CROSS-APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI*

## STATEMENT OF JURISDICTION

In compliance with Rule 12 of this Court, the cross-appellant submits herewith its statement showing the basis of this Court's jurisdiction:

### A

### STATUTES

Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, paragraph (4) (U. S. C. Title 28, Sec. 345).

Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (U. S. C. Title 28, Sec. 47).

## B

### DATE OF DECREE AND APPLICATION FOR APPEAL

The final decree (R. 60)[1] sustaining the order of the Interstate Commerce Commission was entered November 27, 1929. The order allowing the appeal (R. 80) was entered November 30, 1929. The "order for stay of the order of the Interstate Commerce Commission," was entered November 30, 1929. (R. 81.) The application for the cross appeal therefrom was filed December 23, 1929 (R. 101); the order allowing cross appeal was entered December 23, 1929 (R. 103); the cross appeal was docketed in this Court February 8, 1930.

## C

### NATURE OF THE CASE

The suit was brought to enjoin and annul an order of the Interstate Commerce Commission issued June 10, 1929, in proceedings entitled "No. 15234, In the Matter of Divisions of Freight Rates In Western and Mountain-Pacific Territories," 156 I. C. C. 94. The order prescribed the just and reasonable divisions of freight rates to be received by the common carriers named therein.

The specially constituted District Court for the Western District of Missouri, in a written opinion

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[1] All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the District Court and on file with the Clerk of this Court. The record has not yet been printed.

(R. 1758), held that the order was valid in all respects, and dismissed the petition for injunction.

Upon the petitioners' application, the Court granted and issued the "order for stay of the order of the Interstate Commerce Commission," pending petitioners' appeal to this Court. From the "stay order" the cross appeal was prosecuted.

## D

### CASES SUSTAINING JURISDICTION

*Virginian Railway Co.* v. *United States*, 272 U. S. 658.

*St. Louis & O'Fallon Ry. Co.* v. *United States*, 279 U. S. 461.

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MARCH, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930